Supreme Court, U.S.
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IN THE

Supreme Court of the United States

JOHN MARSHALL COGSWELL,

Petitioner,

v.

UNITED STATES SENATE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Tenth Circuit affirmed the district court's dismissal of the petitioner's claim for lack of jurisdiction because petitioner did not have standing and because his claim was not justiciable. Petitioner asserted jurisdiction under 28 U.S.C. § 1331 because his claim was a civil action arising under the Constitution of the United States. The claim of the petitioner, made individually [as a member of the federal bar] and as a member of the constituent power of the United States, sought declaratory judgment that the U.S. Senate, as a matter of law, must give its advice and consent on the president's nominations for judges under Article II, § 2 of the Constitution within a reasonable time and suggested remedies for breach of that obligation.

Three questions are presented:

1. Does 28 U.S.C. § 1331 give the district court jurisdiction where petitioner's claim was a civil action "arising under the Constitution . . . of the United States" even though petitioner may not have standing and his claim may not be justiciable?

2. Does the petitioner have standing where he asserts his claim as a member of the federal bar and on behalf of the constituent power of the United States under circumstances which implicate First Amendment rights to access to the courts?

3. Is the petitioner's claim justiciable where none of the standards previously adopted by the Court which preclude justiciability apply to him?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit has not yet been reported. See Appendix A.

STATEMENT OF JURISDICTION

The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Tenth Circuit's opinion was rendered on December 2, 2009. No petition for rehearing was filed.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Section 2 of Article II of the U.S. Constitution.

> "The President . . . shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . Judges of the supreme Court, and all other Offices of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: . . ."

2. Section 1 of Article III of the Constitution.

> "The judicial power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may, from time to time, ordain and establish . . ."

3. Section 2 of Article III of the Constitution.

"The judicial Power shall extend to all Cases, in Law and Equity arising under this Constitution..."

4. 28 United States Code § 1331.

"The district courts shall have original jurisdiction of all civil actions arising under the Constitution, the laws or treaties of the United States"

5. 28 United States Code 133(a).

"The President shall appoint, by and with the advice and consent of the Senate, district judges for the several judicial districts, as follows:

Districts	**Judges**
[They are listed]	[They are numbered]

6. House Report No. 91-887 to Public Law 91-272 passed in 1970.

> "The Committee concludes that the 54 permanent and 3 temporary judgeship positions . . . will be adequate to assure *reasonably prompt consideration* of all cases filed. . . ."

7. Senate Report No. 95-170 to Public Law 95-486 passed in 1978.

> "The purpose of the proposed legislation, as amended, is to provide for the creation of additional district and circuit judges to *efficiently and expeditiously* handle the business brought before them."

8. Senate Report No. 101-416 to Public Law 101-650 passed in 1990, Title II thereof being designated the Federal Judgeship Act of 1990.

> "[Its purpose is to] Promote for all citizens – rich or poor, individual or corporation, plaintiff or defendant – the *just, speedy and inexpensive* resolution of civil disputes in our Nation's federal courts."

9. Statement of Senator Orrin Hatch in support of Public Law 98-353 passed in 1984.

> "Congress has the obligation to adjust the size of the Federal judiciary when necessary. Title II of this Bill is an exercise of that responsibility.
>
> "A burgeoning case load is jeopardizing the efficient and fair administration of justice in many districts. When the number of cases filed in a district increases dramatically without any concomitant increase in judicial resources

> available to resolve those disputes, intolerable strains are placed on the institution which Alexander Hamilton described as the "bulwark of a limited constitution"; namely, the Federal judiciary. (Federalist Paper No. 78 (Hamilton))."

10. H.R. 4093 introduced in 2005 and titled the "Federal Judgeship and Administrative Efficiency Act of 2005", for the purpose of authorizing additional district and circuit court judges. The report, noting the Bill's authority for the creation of 44 permanent judgeships and 12 temporary judgeships for the United States District Courts, states:

> "The creation of these judgeships reflects the recommendations of the Judicial Conference of the United States which conducts a biennial review of the judgeship needs of all United States District Courts to determine if any of the courts require additional judges *to appropriately administer civil and criminal justice* in the Federal court system. This title reflects the recommendations presented to the Congress in March 2005. (Emphasis supplied.)"

STATEMENT OF THE CASE

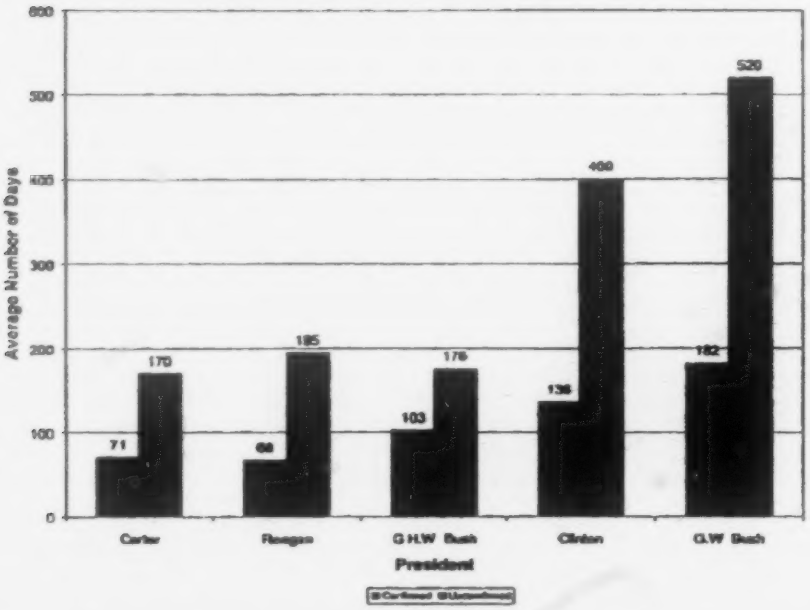
1. Petitioner is a lawyer who practices in federal court. He is one of approximately 10,500 parties and lawyers doing business in the Colorado district court at any one time. He is authorized by rule to practice in any other district or circuit court and is admitted to this Court. He and other federal court lawyers represent a small fraction of the population of Colorado and the nation.

Petitioner, having experienced unreasonable delay in an unrelated case in the Colorado district court in which he was a party, began investigating the process by which the Senate gives advice and consent under Article II, § 2 of the Constitution with respect to the president's nominations of federal judges.

Congress increases the number of judgeships from time to time by amendments to 28 U.S.C. § 133(a). Legislative history accompanying these amendments demonstrates Congress' concurrence with the Court that citizens should have meaningful access to the courts and that a specified number of authorized judges is needed to assure this.

The Senate traditionally has supported the nominations for judgeships made by a president. Between 1939 and 2007, the Senate Judiciary Committee voted favorably on all nominations other than on 18 district or circuit court judicial nominations which is an exemplary record considering the hundreds of judges nominated and appointed during such period. However, the percentage of nominees confirmed after President Reagan left office in 1989 illustrates a degradation in the appointment process from a 94.8% confirmation rate to 88.1%. More alarming is the increasing average number of days from the first nomination to final Senate action as shown by a comparison of the processing time of nominated judges confirmed and not confirmed between January 20, 1977 and August 4, 2008 below. The Senate's delay prevents the president from doing his job to appoint judges, compromises the quality of the judiciary and impedes meaningful access to the courts.

Figure 2. Average Number of Days from First Nomination to Final Senate Action, Nominees to the Article III U.S. District Courts, January 20, 1977-August 4, 2008



Source: CRS Judicial Nominations Database. Numbers atop the bars indicate the average number of days to final action. Unconfirmed nominees include those whose nominations were rejected by the Senate, withdrawn by the President, or returned to the President and not resubmitted. Data are current as of August 4, 2008, and do not include any nominees pending as of that date.

The result of the delay in processing nominations expeditiously is that meaningful access to federal courts is being denied to petitioner and other U.S. citizens and, in Congress' own words, the consideration of cases by the judiciary cannot be "reasonably prompt", efficient and expeditious or "just, speedy, and inexpensive".

In discussing judicial power under Article III, § 2, James Madison said:

> It is agreed on all sides that the powers properly belonging to one of the departments ought not to be directly and completely administered by either of the other departments. It is equally evident that none of them ought to possess, directly or indirectly, an overruling influence over the others in the administration of their respective powers. *It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it.* [Emphasis supplied.]

Federalist Paper No. 48 (Madison). It did not occur to Madison in discussing the appointment process that the Senate might ignore its own duties and responsibilities and thereby exercise an overriding influence on the administration of judicial power and pass the limits assigned to it. However, he did acknowledge that any encroaching power "ought to be effectually restrained".

Of necessity, the nomination and appointment of judges is an exception to the doctrine of the Separation of Powers. This exception was made based on the understanding that power so delegated by the Constitution, power delegated to a political body over the body acknowledged to be the bulwark of the Constitution, would be delegated to a body (Senate) having virtue, honor and integrity thereby creating a duty in that body to respond in like measure.

Even though the mode of the Senate in consenting to judges is the same as that of consenting to officers of the United States in general, the Senate, upon information and belief, processes officers nominated by the president with its advice and consent in approximately 45 days compared to substantially longer periods for nominated judges thereby subordinating its honor and integrity to political considerations, demeaning its respectability and incurring the opprobrium of the general public.

The legislative history accompanying amendments to 28 U.S.C. § 133(a) authorizing judges demonstrates Congress' concurrence with the Court that citizens should have meaningful access to the courts. Thus, for example, various legislative reports acknowledge that additional judges are needed "to assure *reasonably prompt consideration* of all cases filed . . .", "to *efficiently and expeditiously* handle the business brought before them [courts]", to "Promote . . . the *just, speedy and inexpensive* resolution of civil disputes in our Nation's federal courts", to avoid "intolerable strains . . . on the institution which Alexander Hamilton described as the 'bulwark of a limited constitution'", and "*to appropriately administer civil and criminal justice* in the Federal court system."

The sum of the foregoing facts is that the petitioner, a lawyer and federal court litigant, is a member of a small group of citizens who has been injured as a matter of law by delay of the Senate to advise and consent with respect to the president's nomination of judges. The harm is real, palpable and a clear denial of his First Amendment right to reasonable access to federal courts

as evidenced by findings made by the U.S. Congress itself. These findings represent standards which, when not satisfied by the Senate, compel the conclusion that the Senate, by its disregard of the Constitution, intentionally and without justification denied the petitioner and others similarly situated their First Amendment rights.

2. Petitioner filed his complaint in the Colorado district court on September 9, 2008 complaining of the delay by the Senate in advising and consenting with respect to the president's nominations of judges and sought an injunction enjoining and restraining the Secretary of the Treasury from making payments to the Senators until the appointments were acted upon or, alternatively, for a declaratory judgment that the Senate is obligated to advise and consent within a reasonable time on the nominations.

On November 14, 2008, the Senate moved to dismiss for lack of jurisdiction, standing and justiciability. A hearing was held on February 5, 2009. The magistrate judge's ruling on the motion to dismiss as applied to the complaint was mooted by petitioner's amended complaint filed on February 10, 2009 seeking declaratory judgment only. On February 12, 2009, the magistrate judge issued his Supplemental Recommendation to Dismiss the amended complaint. On February 20, 2009, petitioner filed his Objections to Proposed Findings and Recommendation of Magistrate. On March 2, 2009, the district court overruled the petitioner's objections, adopted the recommendations of the magistrate judge and dismissed the amended complaint by an order of the same date. On March 3, 2009, a judgment was entered to the same effect granting the motion to dismiss.

Petitioner filed his Notice of Appeal on March 31, 2009. The Tenth Circuit affirmed on December 2, 2009.[1]

REASONS FOR GRANTING THE PETITION

The Court's cases on jurisdiction, standing and justiciability as they relate to Article III of the Constitution are so intertwined, overlapping and confusing as to deny legality to federal court litigants and their attorneys. This observation is evidenced by the admissions of the Court, the number of exceptions to standing rules, the absence of any basis for understanding why standing exists in some cases and not others, and the disagreements among the justices. The result is a scarcity of legality which, in this case, allowed the lower courts to dismiss petitioner's claim for lack of jurisdiction based upon their erroneous view of jurisdiction, standing and justiciability.

The Court, in *Marbury v. Madison*, 5 U.S. 137, 163 (1803), said that, "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury". However, a review of the cases shows that not every injury justifies standing. Some injuries are more important to the Court than others. Plaintiffs with unimportant injuries do not have standing while plaintiffs with important injuries do have standing. Injuries which are palpable or which implicate the First

1. Since the district court adopted the recommendations of the magistrate judge and since the Tenth Circuit affirmed the district court, the petitioner will refer to the action dismissing his amended complaint as action by the district court or the lower courts.

Amendment or procedural injury are important to the Court. Complaints about congressional appropriations and the proper enforcement of federal laws might be important depending upon the constituency of the justices. The line of demarcation between what injuries are important and what injuries are not has drifted from tradition, to the concept of separation of powers, to the idea of democracy, to the common understanding which is, itself, subject to the Court's view of what is "appropriate".

Common understanding is distinctly a political concept unsuited to the judiciary. It refers to what most people think. Most people differ on subjects like whale watching, endangered species, scenic views in distant places, the effect of zoning laws and nuclear power plants. However, they love their Constitution and today cannot stand Congress in general or the Senate in particular. They uniformly agree with Madison's view that the Senate should be a noble institution with honorable men and abhor its delay in acting on presidential nominations of judges, particularly when they find out that Congress itself has acknowledged that such delay compromises the integrity and quality of the judiciary and denies meaningful access to the courts.

The magistrate was afraid to tread on new territory so he searched the cases to justify a dismissal of the petitioner's amended complaint for lack of jurisdiction, intertwining his reasoning with references to standing and justiciability and in disregard of petitioner's arguments, most particularly the one based on *Baker v. Carr*, 369 U.S. 186 (1962). The district court affirmed the magistrate's view without material comment. The

Tenth Circuit affirmed the district court in three pages implying the petitioner's injury was not important.

This Court should grant the petitioner's writ to give the lower courts a lesson in courage and inquiry and provide itself an opportunity to restore legality to an area of the law which needs it.

I. Review Is Warranted Because The Lower Courts Dismissed Petitioner's Amended Complaint By Ignoring *Baker v. Carr*, 369 U.S. 186 (1962), In Favor Of Other Cases Which Contradict *Baker v. Carr* And Which Create A Judicial Mess Of The Jurisprudence Clustered About Article III Of The Constitution As It Relates To Jurisdiction, Standing And Justiciability.

A. The lower courts' holding that jurisdiction over petitioner's claim is dependent on standing or justiciability warrants review.

Article III, § 1 of the Constitution states that "the judicial power of the United States, shall be vested in one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish". In furtherance of the foregoing, Congress has enacted 28 U.S.C. § 1331 which states "the district court shall have original jurisdiction of all *civil actions* arising under the Constitution, laws or treaties of the United States". Noticeably, such statute does not confer jurisdiction over "cases" arising under the Constitution but over "civil actions" arising under the Constitution. Fed. R. Civ. P. 2 states "There shall be one form of action to be known as 'civil action'". The petitioner's amended complaint

was a civil action and the district court had judicial power to deal with it under 28 U.S.C. § 1331. Whatever "the judicial power of the United States" is, it vested in the district court by 28 U.S.C. § 1331 and the district court erred in dismissing the amended complaint for reasons of standing and justiciability. At the very least, the district court was obligated to find that a civil action must be a "case" before 28 U.S.C. § 1331 applies.

Noticeably, the judicial power is vested in Article III, § 1 but *extends* in Article III, § 2 "to all cases . . . arising under this Constitution . . ." To petitioner's knowledge, this Court has never definitively held that a district court has no jurisdiction unless the "civil action" is an Article III "case or controversy" even though there are some comments that jurisdiction of civil actions under 28 U.S.C. § 1331 is narrower than jurisdiction under Article III, § 2. *Merrell Dow Pharmaceuticals, Inc. v. Thompson*, 478 U.S. 804, 807-808 (1986). Any such construction without a concomitant construction of whether a "civil action" can be included in the "judicial power of the United States" under Article III, § 1 even if not included in a "case" under Article III, § 2 is incomplete. The issue here is not the "arising under" issue discussed in *Verlinden B.V. v. Central Bank of Nigeria*, 461 U.S. 480, 495 (1983).

The meaning of a "case" has occupied many cases before this Court with enough evolution and change and dissenting opinions to muddle the clear meaning of that term. While many cases tie "standing" to a "case" and a "case" to the jurisdiction of the courts, the seminal case of *Baker v. Carr*, 369 U.S. 186 (1962), did not do this. Rather, in that case, the Court easily found jurisdiction

and then proceeded to standing and justiciability which were for it unrelated to jurisdiction. There, the Court was confronted with a claim made by certain Tennessee residents, individually and on behalf of others similarly situated, that they were denied equal protection of the laws accorded them by the Fourteenth Amendment by virtue of a 1901 Tennessee apportionment statute which debased their votes which would be "difficult or impossible" to change. *Id.* at 193. The district court ruled that it lacked jurisdiction of the subject matter and that no claim was stated upon which relief could be granted. This Court construed the district court ruling as embracing two possible reasons for dismissal:

> First: That the facts and injury alleged, the legal bases invoked as creating the rights and duties relied upon, and the relief sought, fail to come within that language of Article III of the Constitution and of the jurisdictional statutes which define those matters concerning which United States District Courts are empowered to act;
>
> Second: That, although the matter is cognizable and facts are alleged which establish infringement of appellants' rights as a result of state legislative action departing from a federal constitutional standard, the court will not proceed because the matter is considered unsuited to judicial inquiry or adjustment.

> We treat the first ground of dismissal as 'lack of jurisdiction of the subject matter'. The second we consider to result in a failure to state a justiciable cause of action.

Id. at 196.

In making its ruling, the Court found that there existed jurisdiction, that the plaintiffs had standing, and that there existed a justiciable cause of action but that it would be improper for the Court on the record before it to determine the appropriate remedy.

The Court said that the distinction between jurisdiction and justiciability was "significant" since the absence of the former foreclosed consideration of the case but not the latter. The Court further said jurisdiction existed disjunctively either because the case arose under the Constitution or was a "case or controversy" under Article III or was covered by a jurisdictional statute. *Id.* at 198. The Court said its case arose under the Constitution and was authorized by a "civil action" type statute like the petitioner's case and therefore there was jurisdiction. It also said that "the only possible doubt" as to whether it was a "case or controversy" was settled by the opinion itself. In effect, the Court said that the "judicial power of the United States" gave the Court jurisdiction before considering Article III, § 2 and that those words had meaning before they were extended. Even when they were extended, there was a case since the claim was justiciable.

The only real issue in *Baker v. Carr* was whether the claim was "so attenuated and unsubstantial as to be absolutely devoid of merit". *Id.* at 199. Since the Court found the case was not of such character, it had no problem in finding that subject matter jurisdiction existed under Article III of the Constitution. The Court said, "Since the complaint plainly sets forth a case arising under the Constitution, the subject matter is within the federal judicial power defined in Art. III, § 2, and so within the power of Congress to assign to the jurisdiction of the District Courts." *Id.* at 200. Other language in the case as discussed above inferred that the jurisdiction of the district courts depended more on the meaning of "judicial power of the United States" than the term "case" as used in Article III, § 2 which was added to make it clear that lawsuits arising under the Constitution were included in that judicial power of the United States regardless of what Congress might do.

The petitioner relies on *Baker v. Carr* for his argument that jurisdiction exists and chooses to disregard those cases which tie jurisdiction to standing or justiciability.[2] The only factual issue on jurisdiction is

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2. The petitioner respectively suggests that verbiage in many cases, including cases in this Court, is loosely used which has had the unfortunate effect of causing courts to say that standing is jurisdictional. Such confusion is not unexpected in area of the law which is defined in terms of "the idea of Separation of Powers" or "the role of courts in a democratic society" or a "common understanding". Yet, much clarification in the law would result from a holding that standing has nothing to do with jurisdiction but rather represents one of many

(Cont'd)

whether petitioner's amended complaint is "so attenuated and unsubstantial as to be absolutely devoid of merit" such that, in effect, it is not a claim, but rather like an argument in a saloon. In any case, if the lower courts were wrong on standing and justiciability, they have to be wrong on jurisdiction by their own reasoning.

The only legal issue on jurisdiction is whether a "civil action" under 28 U.S.C. § 1331, as defined by Fed. R. Civ. P. 2, is within the "judicial power of the United States" to decide as determined by Congress. The answer is "yes" under *Baker v. Carr*.

B. The lower courts misapplied the law in determining that the petitioner had no standing.

When an average federal court lawyer who still believes there is some legality in America decides to do something about the Senate's disregard of the

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(Cont'd)

judicial policies which, when applicable, precludes the courts from exercising their jurisdiction. Consider the following: In *Baker v. Carr*, the court saw jurisdiction and standing as different concepts. In *Warth v. Seldin*, 422 U.S. 490, 498-499 (1975), constitutional standing was jurisdictional but prudential standing was not but then it was said both are "threshold determinants of the propriety of judicial intervention", *Id.* at 517, which implicates the exercise of jurisdiction, not jurisdiction itself. In *Allen v. Wright*, 468 U.S. 737, 790 (1984), the Court talks about standing as what is required "to invoke the power of a federal court" being a reference to exercise of jurisdiction and not jurisdiction itself. To the same effect is *United States v. Raines*, 362 U.S. 17, 21 (1960) ("In the exercise of that jurisdiction, it is found . . .")

Constitution and the honor and nobility expected of it by the Founding Fathers, he knows he has to have "standing".

The first thing he notices is the language in *Marbury v. Madison*, 5 U.S. 137 (1803), about the need for "injury". Yet, this Court has made clear that not every injury will entitle one to the protection of the laws. The Court has said one needs a particular kind of injury or he does not have standing. In *Baker v. Carr*, the Court said there was standing where there was an actual controversy and where the plaintiff alleged "a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues . . ." *Id.* at 204. However, these simple rules began to change.

In *Allen v. Wright*, 468 U.S. 737 (1984), the Court said standing was one of those doctrines that cluster about Article III which "relate in part, and in different though overlapping ways, to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government". *Id.* at 750. In its effort to give substance to the word, the Court has relied on tradition, *Id.* at 752, and a "concern about the proper – and properly limited – role of the courts in a democratic society . . .", *Warth v. Seldin*, 422 U.S. 490, 498 (1975), or "the idea of separation of powers", *Allen v. Wright*, *supra*, at 750. In *Allen v. Wright*, the Court acknowledged the "absence of precise definitions" but stated it "hardly leaves courts at sea in applying the law of standing" as it proceeded to ask rhetorical

questions which could only be answered by subjective determinations. *Id.* at 751. The abyss of subjectivity is also made apparent by the lack of unanimity in the Court on major standing questions with dissenting justices complaining that standing decisions reflect a hostility to the underlying claims which is likely what occurred in this case.

In an effort to give shape to on an amorphous term, the Court decided that the "central mechanism of separation of powers depends largely upon common understanding of what activities are *appropriate* to legislatures, to executives, and to courts" (emphasis supplied), *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559-560 (1992), and in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 102 (1998), stated "standing to sue is part of the common understanding of what it takes to make a justiciable case". The Court fails to define what is "appropriate" or what is a "common understanding". Complicating the matter is the Court's position that standing inquiry involves both constitutional and prudential limitations, the former dealing with jurisdiction itself and the latter dealing with the exercise of that jurisdiction. With respect to the former, the Court says "Standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III". *Warth v. Seldin*, 422 U.S. at 498. Of course, the average federal lawyer recognizes that these complicated and intertwined concepts give the courts wiggle room in avoiding cases which they subjectively believe should not be decided.

Shackled by standing rules which did not always work, the Court has crafted exceptions. Thus, in *Dombrowski v. Pfister*, 380 U.S. 479, 485-487 (1965), the Court relaxed the rules where First Amendment rights were implicated. In *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), the Court reinforced the First Amendment theme and extended it to overly broad statutes, particularly claims where rights of association were ensnared in statutes which, by their broad sweep, might result in burdening innocent association. The Court stated:

> Facial overbreadth claims have also been entertained where statutes, by their terms, purport to regulate the time, place, and manner of expressive or communicative conduct . . . [citations omitted], and where such conduct has required official approval under laws that delegated standardless discretionary power to local functionaries, resulting in virtually unreviewable prior restraints on First Amendment rights [citations omitted].[3]

Id. at 612-613.

In *United States v. Raines*, 362 U.S. 17, 22 (1960), the Court said exceptions were grounded in "weighty, countervailing policies". In *Lujan v. Defenders of*

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3. While Madison would not have deemed the Senate a local functionary, the common understanding today is otherwise. Compared to the sovereign power of the people, the Senate is today a "local functionary" having standardless discretionary power only because it refuses to comply with duties imposed upon it by the trust of the Founding Fathers.

Wildlife, 504 U.S. 555 (1992), the Court acknowledged an exception for "procedural injury" observing that procedural rights "are special: The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards of redressability and immediacy". *Id.* at 573, FN 7.

The petitioner can test the Court's consistency and adherence to legality by its willingness to find standing in cases where the plaintiffs were even more remote from injury than the petitioner in this case. Thus, in *Baker v. Carr*, the plaintiffs were Tennessee voters suing on their own behalf and on behalf of all voters in their respective counties to maintain "the effectiveness of their votes". In *U.S. v. SCRAP*, 412 U.S. 669 (1973), law students had standing to challenge the ICC's failure to prepare an impact statement explaining that all persons who utilized the scenic resources of the country and breath its air could claim harm. In *Duke Power Co. v. Carolina Environmental Standing Group, Inc.*, 438 U.S. 59 (1978), the Court found that citizens and their corporations living near the site of a proposed nuclear power plant had standing to challenge the constitutionality of an act of Congress. In *Japan Whaling Association v. American Cetacean Society*, 478 U.S. 221 (1986), the Court implicitly found that conservation groups seeking declaratory and mandamus relief against the Secretary of Commerce for violating statutory duties with respect to international whaling quotas had standing (the case turned on the political question doctrine, the construction of statutes and the actions of the Secretary of Commerce). In *Friends of the Earth Inc. v. Laidlaw Environmental*

Services, Inc., 528 U.S. 167 (2000), the Court held that organizations have standing to bring citizen suits for civil penalties payable to the government when on-going violations of a national pollutant discharge elimination system permit are alleged.

In this case, petitioner's First Amendment rights are not in dispute and he should have standing on that basis.[4] The potential to chill First Amendment activity is frequently used to support the application of an exception. *Forsyth County, GA v. Nationalist Movement*, 505 U.S. 123, 129 (1992). The chilling consequences are broad and exist from any careful analysis of the federal judicial system which, if it does not have the requisite number of judges as determined by Congress, cannot provide "reasonably prompt consideration", "efficient and expeditious handling of business", the "just, speedy and inexpensive resolution of civil disputes", and "efficient and fair administration of justice". Petitioner's claim not only affects members of the federal bar but applicants for federal judgeships and those citizens who expect and depend on a healthy judiciary not influenced by political considerations and fear the potential for backroom deals between Senators and persons nominated for judgeships.

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4. Collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment. *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 585 (1971). *See also Woodford v. NGO*, 548 U.S. 81, 122-123 (2006). In *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741 (1983), the Court said, "[T]he right of access to the courts is an aspect of the First Amendment right to petition the government for redress of grievances."

The lower courts did not address petitioner's claim of "procedural injury" and the relaxation of the standing rules in those circumstances confirmed in Footnotes 7 and 8 in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572-573 (1992). The Court has said a plaintiff can enforce procedural rights as long as the procedures in question are designed to protect some "threatened concrete interest of his that is the ultimate basis of his standing". *Id.* at 573, FN 8. Insofar as the petitioner is a member of the federal bar relying on the existence of enough judges, in the eyes of Congress, to have reasonable efficient, fair and expeditious proceedings, he has a concrete interest which is threatened by the absence of the requisite number of judges in any federal court.

Petitioner believes he has standing both as an individual and on behalf of citizens generally who have "no effective avenue of preserving their rights themselves". *Broadrick*, *supra*, at 611. And to the extent standing is based upon a common understanding,[5] petitioner should, at the very least, be entitled to prove what that common understanding is, one which most reasonable people would find to exist here, namely that the Senate must act promptly upon nominations and should have its feet held to the fire when it does not.[6]

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5. The "common understanding" is a poor predicate for standing since it can change. It is a political term and, as it changes, so does the class of those who are entitled to use the federal courts. The law should not be made to depend on an organic standard.

6. The "common understanding" is clear. We all know that, if Congress says a district needs "x" district judges and "y"

(Cont'd)

A review of the cases shows that, with the exception of *Baker v. Carr*, the Court's foray into a search for standards has not been helpful. The many exceptions, the controversies among the justices, the tendency of the Court to find standing when it wants to and the definition of standing in terms of "tradition" or "the idea of democracy" or "the separation of powers" or "common understanding" makes understandable Justice

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(Cont'd)

appellate judges to have fair access to the courts, then having less than those numbers means Congress is wrong or justice is not provided. We all know that the Senate should have no more than a reasonable time to act on a president's nomination of judges. We all know there is presently nothing anybody can do about the Senate's refusal, for example, to act on judicial nominations for up to an average of 520 days. We all know that a qualified jurist will exercise caution in agreeing to be a federal judge knowing his current practice might suffer interminable delays which will likely discourage qualified persons from taking the first step (some people call this "chilling"). We all know that the Senate is dishonorable when it does not do its job and fails the expectations imposed upon it by the Founding Fathers. We all know that the Senate's attention to its solemn duties have been diminished over recent years and that respect for Separation of Powers, while honored by the courts, has been dishonored by the Senate. We all know that, among the grievances contained in the Declaration of Independence, there are some sourced in the delay of the King to approve laws passed by the colonies. We all know that the Senate thinks nothing can be done about its misconduct. We all know that a jury would not find petitioner's case to be a grievance, unhearable in court. We all know that it is the duty of the courts to tell us what the law is. And we all know it is wrong to shirk this duty out of some respect for Separation of Powers wholly failing in reciprocation by the Senate and wholly disrespectful of the sovereign power of the People.

O'Connor's comment that standing is more than an intuition but less than a rigorous theory. The Court admits that standing "incorporates concepts concededly not susceptible of precise definition" and is characterized by the "absence of precise definitions". *Allen v. Wright*, 468 U.S. at 751. None of this bodes well for rule of law. The result is that the Court presents reasoned decisions but ultimately finds standing when it thinks it "should". Thus, the Court will carve an exception to its standing rules when it is important to it to do so.

In the last analysis, the standing issue rests on where along a line beginning with no injury to indirect injury to collective injury to direct and palpable injury does one find a claim the courts will hear. *Baker v. Carr* continues to have the best standing test which is whether the plaintiff has "alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction to justify the exercise of the court's remedial powers on his behalf". *Baker v. Carr*, *supra* at 204. The "personal stake" determination is a matter of easier definition than other concepts employed by the Court. Yet, the lower courts disregarded this test.

The petitioner is an attorney who practices in federal court and has embroiled himself in that concrete adverseness which sharpens the presentation of issues. He recognized in advance of filing that his position would be met with hostility from the courts. As a member of the federal bar, he is not making a general grievance but a specific one, one which most citizens are not even aware of. If the district court were properly to deny standing, it should have conducted a hearing to

determine whether the plaintiff had such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the Court so largely depends. But the district court did not do that. Rather, it opted for a maze of complex rules which gave it an easy way out.

C. The lower courts erred in holding the petitioner's claim was not justiciable because none of the standards for determining justiciability applied to petitioner but were applied anyway because the judges of the lower courts lacked judicial courage and would have dissented had they been justices in *Marbury v. Madison*.

The petitioner's claim is justiciable unless it is "unsuited to judicial inquiry or adjustment". *Baker v. Carr*, 369 U.S. at 196. The petitioner's claim is suited for judicial inquiry but the lower courts have plainly misapplied the law for at least four reasons.

First, the district court limited its consideration of justiciability to the political question doctrine citing *Schroeder v. Bush*, 263 F.3d 1169, 1173-74 (10th Cir. 2001). The court reasoned that the petitioner's claim was analogous to the treaty negotiation and confirmation process discussed in *Schroeder* which was a political question case. The analogy is incorrect and *Schroeder* is plainly inapplicable. *Schroeder* was correctly decided but invoked issues of policy, not law, as to which the judiciary has no competence or responsibility. In *Marbury v. Madison*, 5 U.S. 137 (1803), the Court held

that the judiciary could review acts of Congress for repugnancy to the Constitution despite the absence of any express power in the Constitution to do so. It can do the same for Senate inaction when it finds a duty to act.

Second, the district court argued the absence of "judicially discoverable and manageable standards". This plainly is not the case since Congress itself has established the standards in its legislative history and has violated the standards. The standards are beyond discovery and are manageable. They are presumed to have been ratified by Congress when the underlying legislation was enacted. *Georgia v. Randolph*, 547 U.S. 103, 123 (2006). They are law.

Third, the district court said that, by granting petitioner's request, it would engage in the utmost expression of a lack of respect due coordinate branches of government. Certainly, there is no more disrespect to the Senate by granting petitioner relief on his claim than there is every time a court declares one of Congress' laws to be unconstitutional. By way of contrast, the Senate's behavior in not doing its job constitutes a continuing and greater disrespect to the sovereign power of the People who expect the Senate to live up to the standards and expectations applied by the Founding Fathers.[7]

7. *The institution of delegated power implies that there is a portion of virtue and honor among mankind*, which may be a reasonable foundation of confidence. And experience

(Cont'd)

Lastly, the district court argued that the Constitution "bestows no such power onto the Judiciary to regulate the timing in which the Executive or Legislature exercise their constitutional duties, and the Court cannot find an instance where such exercise of power took place". Appendix A at 4a. This is also contrary to the law. *Marbury v. Madison* states that a court's role is to determine the law. And in those cases where timing of action is required, the courts have not hesitated to provide a reasonable construction. The sole issue here is whether such a construction is somehow prohibited because it involves the behavior of the Senate. The petitioner would observe that there is no rule anywhere that relieves the Senate from scrutiny over its bad behavior anymore than it is relieved from scrutiny when it joins with the House of Representatives to enact an unconstitutional law.[8]

(Cont'd)

> justifies the theory . . . A man disposed to view human nature as it is, without either flattering its virtues or exaggerating its vices, will see sufficient ground of confidence *in the probity of the Senate* to rest satisfied, not only that it will be impracticable to the executive to corrupt or seduce a majority of its members, but that the necessity of its co-operation in the business of appointments will be a considerable and salutary restraint upon the conduct of that magistrate. Nor is the *integrity of the Senate* the only reliance. . . .

(Emphasis supplied.) Federalist Paper No. 76 (Hamilton).

8. "No man in this country is so high that he is above the law. No officer of the law may set that law at defiance with impunity. All the officers of the government from the highest to the lowest, are creatures of the law, and are bound to obey it." *United States v. Lee*, 106 U.S. 96, 220 (1882).

If the district court was correct in its ruling, it is time for this Court to change the law, something this Court does when "governing decisions are unworkable or are badly reasoned". *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

The courts pay much attention to the Separation of Powers and the respect needed to preserve in each of them the separate station intended by the Founding Fathers. Yet, the greatest power of all, the one from which the three branches of powers in the Constitution found in Articles I, II and III spring forth, is the trunk itself – the sovereign power of the People recognized as an afterthought in the Tenth Amendment – and to this power must be assigned the greatest respect. For this Court, or any court, to tolerate disrespect of the sovereign power occasioned by the abuse of any other power is to undermine the stability of our government. The reason is that the stability of government depends upon a decent reverence for the system of decision-making upon which it is based.[9] When this reverence is undermined, there begins an erosion of respect not only for the abusing power but for the power that has best been enabled by the Constitution to remedy the abuse but failed to do so. In this case, that is the judicial power.

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9. "Wise politicians will be cautious about fettering the government with restrictions that cannot be observed, because they know that every breach of the fundamental laws, though dictated by necessity, impairs that sacred reverence which ought to be maintained in the breast of rulers towards the constitution of a country. . . ." Federalist Paper No. 25 (Hamilton).

The courts have fashioned rules to define what a "Case" is with the best of intentions in order to accord to the respective powers in the Constitution the respect deemed by them necessary to preserve the Constitution and the stability of the government established thereby. These rules are grounded in policy and prediction. They strive to provide predictability which gives rise to reasonable expectations. Yet, while predictability underlies every decision, when it comes to policy, a court's ability to make good decisions essential to the future of our government is likely not better than anyone else's.

Using decision-making to resolve arguments among citizens is as old as civilization. But, using decision-making to preserve the *method* of making decisions chosen by a People is indispensible to its future existence. It is far easier to decide on a method of making decisions than it is to decide on the object of that decision-making. That is why the Constitution was possible. It is a document setting forth a method that tells us who makes what kind of decisions and how and what restraints control them. If the method becomes corrupt, it is far more dangerous to the stability of our government than any bad decision. The method has become corrupt in the Senate which hides behind its rules and perceived anonymity.[10]

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10. Why has government been constituted at all? Because the passions of men will not conform to the dictates of reason and justice without constraint. Has it been found that bodies of men act with more rectitude or greater

(Cont'd)

The ultimate test for any justiciability policy is that it further the likelihood the Constitution will be continued and strengthen the sovereign power's respect for the machinery of government established by it. Yet, many of the judicial rules gleaned from the cases do not address this overriding theme. In determining what a "Case" is, the courts have qualified the meaning of that term to mean cases "cognizable at common law or justified by tradition" or to honor the Separation of Powers Doctrine and the idea of democracy with no consideration for the sovereign power of the People. In the process, they have developed a cacophony of rules and exceptions which allow them to reject cases which they subjectively do not want to hear. This process should change.

(Cont'd)

> disinterestedness than individuals? The contrary of this has been inferred by all accurate observers of the conduct of mankind; and the inference is founded upon obvious reasons. Regard to reputation has a less active influence when the infamy of bad action is to be divided among that number than when it is to fall singly upon one. A spirit of faction, which is apt to mingle its poison in the deliberations of all bodies of men, will often hurry the persons of whom they are composed into improprieties and excesses for which they would blush in a private capacity.

Federalist Paper No. 44 (Madison).

CONCLUSION

The district court found that the plaintiff did not have a Case and dismissed his complaint for lack of jurisdiction. It is easy for a court to dismiss a claim because that is mostly what courts do when citizens such as the petitioner challenge compliance with the core procedures of our government. It takes courage to look at the present with an open mind, to evaluate how we make decisions and to relax traditional rules in appropriate cases. This is an appropriate case. "Weighty countervailing considerations" tell us that we are doing more harm by allowing the Senate to disregard its duties than by taking action to assure compliance with those duties. This harm consists of damage to that glue which holds our country together. It consists of damage to the character of our Nation, to the First Amendment, to the Separation of Powers Doctrine, and to the idea of democracy. It extends to a disregard of the "common understanding", indulges clearly inappropriate conduct of the Senate, and ignores the sovereign power of the People.

Despite the court's loyalty to precedent and reluctance to change, a history of the Court's decisions demonstrates that the district court had jurisdiction, that petitioner had standing and that his case was justiciable. His case challenges the Court to include him in that class of cases arising under the Constitution which the Court will hear. The judgment of the lower

courts should be reversed with instructions that the district court has jurisdiction, that the petitioner has standing and that his claim is justiciable. His claim should be remanded for trial.

Respectfully submitted,

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APPENDIX

Supreme Court, U.S.
FILED

No. 09- 091068 MAR 2 - 2010

IN THE OFFICE OF THE CLERK

Supreme Court of the United States

JOHN MARSHALL COGSWELL,

Petitioner,

v.

UNITED STATES SENATE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX

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APPENDIX A — ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DATED AND DECIDED DECEMBER 2, 2009

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 09-1134

(D.C. No. 08-CV-01929-REB-MEH)

(D. Colo.)

JOHN MARSHALL COGSWELL,

Plaintiff-Appellant,

v.

UNITED STATES SENATE,

Defendant-Appellee.

ORDER AND JUDGMENT*

Before **LUCERO**, **McKAY**, and **MURPHY**, Circuit Judges.

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* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

Appendix A

After examining the parties' briefs and the appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. *See* Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1(G). The case is therefore ordered submitted without oral argument.

In this case Plaintiff, an attorney admitted to the federal bar and acting *pro se*, appeals the district court's dismissal of his claims against the U.S. Senate. Plaintiff originally filed an action against Richard Cheney, as President of the U.S. Senate, alleging that the Senate's failure to timely confirm the President's judicial nominees "denied [plaintiff] meaningful access to this Court and to the judicial power of the United States." (Doc. 1 at 8.) Plaintiff asked the court to issue a declaratory judgment stating that the Senate must act on nominations within four months and that any nominee not put to a vote in that time would be deemed confirmed by the Senate "as a matter of law."[1] (Doc. 1 at 10.) Upon the government's motion to dismiss, Plaintiff's claim was referred to a magistrate judge.

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1. In his original complaint, Plaintiff also alleged that Henry Paulson, as Secretary of the Treasury, aided and abetted the Senate by paying U.S. Senators. Plaintiff asked that the court grant an injunction enjoining Secretary Paulson from making further payments to the Senate until it confirmed the nominees. However, upon Plaintiff's own motion, the court dismissed his claims against Secretary Paulson. Additionally, the court substituted Joseph R. Biden, Jr., as President of the U.S. Senate in place of Richard Cheney.

Appendix A

After reviewing the complaint, the magistrate judge recommended that the government's motion be granted. Specifically, the magistrate judge found that Plaintiff had improperly asserted jurisdiction based on *Bivens* in bringing a suit against a public official in his official capacity, *see Simmat v. U.S. Bureau of Prisons*, 413 F.3d 1225, 1231 (10th Cir. 2005), that Plaintiff's claims did not meet Article III's standing requirements as laid out in *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992), and, additionally, that Plaintiff's claims were otherwise barred by the political question doctrine, *see Schroder v. Bush*, 263 F.3d 1169, 1174 (10th Cir. 2001).

The day after the magistrate judge issued his recommendation, Plaintiff filed an amended complaint substituting the U.S. Senate as the defendant in place of the President of the U.S. Senate., and asserting standing "as a member of the constituent power of the United States and all of its citizens." (Doc. 23 at 6.) In response, the magistrate judge issued a supplemental recommendation in which he reiterated his prior "bases for dismissal" and *sua sponte* recommended dismissal of the amended complaint, again based on subject matter jurisdiction. (Doc. 24 at 2.) After reviewing Plaintiff's objections, the district court approved and adopted both recommendations. Plaintiff appeals the dismissal of his amended complaint. We review all issues on this appeal *de novo*. *See Kane County Utah v. Salazar*, 562 F.3d 1077, 1085 (10th Cir. 2009) (subject matter jurisdiction); *United States v. Eckhart*, 569 F.3d 1263, 1274 (10th Cir. 2009) (standing); *Schroder*, 263 F.3d at 1173 (political question doctrine).

Appendix A

After careful review of the briefs and the record on appeal, we conclude that the district court correctly dismissed the complaint. Accordingly, for substantially the same reasons set forth in the magistrate judge's thorough and well-reasoned recommendations, we **AFFIRM**.

Entered for the Court

Monroe G. McKay
Circuit Judge

APPENDIX B — AMENDED ORDER OVERRULING OBJECTIONS TO AND ADOPTING RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND DECIDED MARCH 2, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Robert E. Blackburn

Civil Case No. 08-cv-01929-REB-MEH

(D. Colo.)

JOHN MARSHALL COGSWELL,

Plaintiff,

v.

UNITED STATES SENATE,

Defendant.

AMENDED[1] ORDER OVERRULING OBJECTIONS TO AND ADOPTING RECOMMENDATIONS OF THE UNITED STATES MAGISTRATE JUDGE

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1. This Amended Order is entered to remove the prior references to striking plaintiff's Amended Complaint, which was in fact filed as of right.

Appendix B

Blackburn, J.

The matters before me are (1) the magistrate judge's **Recommendation on Defendants' Motion To Dismiss Complaint Pursuant to Fed.R.Civ.P. 12(b)(1)** [#22] filed February 9, 2009; (2) the magistrate judge's **Supplemental Recommendation To Dismiss** [#24] filed February 12, 2009; and (3) **Plaintiff's Objections to Proposed Findings and Recommendation s of Magistrate** [#25] filed February 20, 2009. I overrule the objections, adopt the recommendations, dismiss plaintiff's amended complaint, and grant defendant's motion to dismiss.

As required by 28 U.S.C. § 636(b), I have reviewed *de novo* all portions of the recommendation to which objections have been filed, and have considered carefully the recommendation, objections, and applicable caselaw. Even though plaintiff is a licensed attorney, in an abundance of caution because plaintiff is proceeding *pro se*, I have construed his pleadings more liberally and held them to a less stringent standard than formal pleadings drafted by lawyers. ***See Erickson v. Pardus***, 551 U.S. 89 __, 127 S. Ct. 2197, 2200, 167 L.Ed.2d 1081 (2007); ***Andrews v. Heaton***, 483 F.3d 1070, 1076 (10th Cir. 2007); ***Hall v. Belmon***, 935 F.2d 1106, 1110 (10th Cir. 1991) (citing ***Haines v. Kerner***, 404 U.S. 519, 520-21 (1972)). The recommendations are detailed and well-reasoned. Contrastingly, plaintiff's objections are imponderous and without merit.

Therefore, I find and conclude that the arguments advanced, authorities cited, and findings of fact, conclusions of law, and recommendations proposed by the magistrate judge should be approved and adopted.

THEREFORE, IT IS ORDERED as follows:

1. That the magistrate judge's **Recommendation on Defendants' Motion To Dismiss Complaint Pursuant to Fed.R.Civ.P. 12(b)(1)** [#22] filed February 9, 2009, is **APPROVED AND ADOPTED** as an order of this court;

2. That the magistrate judge's **Supplemental Recommendation To Dismiss** [#24] filed February 12, 2009, also is **APPROVED AND ADOPTED** as an order of this court;

3. That the objections stated in **Plaintiff's Objections to Proposed Findings and Recommendation s of Magistrate** [#25] filed February 20, 2009, are **OVERRULED**;

4. That **Defendants' Motion To Dismiss Complaint Pursuant to Fed.R.Civ.P. 12(b)(1)** [#8] filed November 14, 2008, is **GRANTED**;

5. That plaintiff's claims against defendant, United States Senate, as set forth in plaintiff's **Amended Complaint** [#23] filed February 10, 2009, are **DISMISSED** for lack of subject matter jurisdiction;

6. That judgment **SHALL ENTER** on behalf of defendant, United States Senate, and against plaintiff, John Marshall Cogswell, as to all claims for relief and causes of action; and

7. That defendant is **AWARDED** its costs, to be taxed by the Clerk of the Court pursuant to Fed.R.Civ.P. 54(d)(1) and D.C.COLO.LCivR 54.1.

Dated March 2, 2009, at Denver, Colorado.

BY THE COURT:

s/ Bob Blackburn
Robert E. Blackburn
United States District Judge

APPENDIX C — THE SUPPLEMENTAL RECOMMENDATION TO DISMISS OF THE UNITED STATES MAGISTRATE JUDGE FOR THE U.S. DISTRICT COURT FOR THE DISTRICT OF COLORADO DATED AND DECIDED FEBRUARY 12, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-01929-REB-MEH

JOHN MARSHALL COGSWELL,

Plaintiff,

v.

UNITED STATES SENATE,

Defendant.

SUPPLEMENTAL RECOMMENDATION TO DISMISS

Michael E. Hegarty, United States Magistrate Judge.

Plaintiff filed an Amended Complaint on February 10, 2009. (Docket #23.) The Court, pursuant to 28 U.S.C. § 636(b)(1)(A) and D.C. Colo. LCivR 72.1.C, submits this supplement to the Recommendation issued February 9, 2009, and *sua sponte* recommends dismissal of Plaintiff's

Appendix C

Amended Complaint with prejudice for lack of subject matter jurisdiction.[1]

I. Background

The Court incorporates by reference the Background as stated in the February 9, 2009 Recommendation. (Docket #22 at 2-3.) Plaintiff now brings his request for a declaratory judgment against the U.S. Senate itself, and not against Joseph R. Biden, Jr. in his capacity as President of the U.S. Senate. However, the Court's analysis of Plaintiff's claim does not change; the U.S. Senate is not amenable to suit, and

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1. Be advised that all parties shall have ten (10) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a de novo determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. §636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within ten (10) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1164 (10th Cir. 1986).

the Court may not issue the relief requested by Plaintiff because the justiciability requirements of standing and the political question doctrine bar the Court from exercising subject matter jurisdiction over Plaintiff's case.

Plaintiff again requests the Court to issue a declaratory judgment stating "the failure of the U.S. Senate to 'advise and consent' within a reasonable time from the President's nomination of a district judge shall mean that the U.S. Senate has no advice on the appointment and consents to the appointment." (Docket #32 at 9.) Plaintiff further asks that the Court assign a four-month time frame in which the U.S. Senate must advise and consent on the President's nominated judges. (*Id.*)

Fed. R. Civ. P. 12(h)(3) requires, "if the court determines at any time that it lacks subject matter jurisdiction, the court must dismiss the action." Dismissal for lack of subject matter jurisdiction is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). The Court reiterates the bases for dismissal discussed in the

Court's February 9, 2009 Recommendation. (*See* Docket #22.) The Court further offers this supplemental recommendation for *sua sponte* dismissal of Plaintiff's Amended Complaint for lack of subject matter jurisdiction because constitutional and prudential standing, as well as the political question doctrine, bar Plaintiff's claim.

II. Lack of Constitutional and Prudential Standing

In his Amended Complaint, Plaintiff asserts standing based solely on his proclaimed status "as a member of the constituent power of the United States and all of its citizens." (*Id.* at 6.) Plaintiff argues for extension of the Supreme Court's ruling regarding a "liberal" construction of standing in *Broadrick v. Oklahoma*, which recognized the Court's alteration "of traditional rules of standing to permit — in the First Amendment area — 'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with the requisite narrow specificity.'" 413 U.S. 601, 612 (1973) (citation omitted). However, the Supreme Court stated this doctrine regarding "facial overbreadth" of a statute "has been employed by the Court sparingly and only as a last resort." *Id.* at 613. The *Broadrick* Court opined that principles of standing "reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 611. Accordingly, the Court refrains from extending the limited First Amendment

exception in this matter. Thus, the *Lujan v. Defenders of Wildlife* traditional standing analysis applies and requires that, in order to satisfy the jurisdictional requirement of constitutional standing, Plaintiff "must allege (and ultimately prove) that [he has] suffered an 'injury in fact,' that the injury is fairly traceable to the challenged action of the Defendants, and that it is redressable by a favorable decision." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Plaintiff presents no facts alleging an injury that is "concrete and particularized [and] actual or imminent, not 'conjectural' or 'hypothetical,'" as required by *Lujan*. 504 U.S. at 560 (citations omitted). Plaintiff contends he fulfills standing as "a member of the constituent power of the United States," and that the alleged "practice" of the U.S. Senate of delaying its advice and consent to the appointment of federal judges adversely affects U.S. citizens' "access to the courts which is an aspect of the First Amendment right to petition the government for redress of grievances."[2]

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2. To address Plaintiff's claim that the actions of the U.S. Senate denies meaningful access to the judicial power of the United States for the redress of grievances, the Court points him to the rather expeditious resolution of the action he presently brings, which was filed on September 9, 2008, moved for dismissal by the Government on November 14, 2008, and subsequently recommended for dismissal by the Court on February 9 and February 12, 2009. Such evidence directly contradicts Plaintiff's assertion of an injury stemming from inhibited access to the courts.

(Docket #23 at 6.) This contention blatantly violates the bar against asserting a "generalized grievance," which is a well-settled rule in evaluating prudential standing. *See, e.g., Bd. of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (reiterating that a plaintiff must also meet the requirements of prudential standing in addition to constitutional standing) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction."). (Docket #15 at 5.) As established by the Supreme Court in *Allen*, barring the "adjudication of generalized grievances" arises from the determination that such claims are "more appropriately addressed in the representative branches." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Moreover, "'a federal court is not the proper forum to press' general complaints about the way in which government goes about its business." *Allen*, 468 U.S. at 760 (citation omitted). Even if the Court were to do as Plaintiff suggests and issue a declaratory judgment that the U.S. Senate has somehow voided its Constitutional right and obligation to advise and consent to the appointment of federal judges, nothing in Plaintiff's pleadings demonstrates a causal link between such order and the actual appointment of more judges to the federal bench. The Constitution clearly allocates the power to appoint "judges of the supreme court, and all other officers of the United States" to the Executive

Branch upon the advice and consent of the Senate; the Judicial Branch lacks the power to restructure the "apparatus established by the Executive Branch [and Legislative Branch] to fulfill [their] legal duties" as articulated by the Constitution. U.S. Const. art. II, § 2; *see Allen*, 468 U.S. at 761. Thus, Plaintiff presents an explicitly prohibited generalized grievance and demonstrates no injury-in-fact, no causation, and no redressability. Therefore, Plaintiff fails to satisfy constitutional and prudential standing.

III. The Political Question Doctrine

In addition to the bar of constitutional and prudential standing, the political question doctrine precludes Plaintiff's action. "Prudence, as well as separation-of-powers concerns, counsels courts to decline to hear 'political questions.'" *Schroder v. Bush*, 263 F.3d 1169, 1173-74 (10th Cir. 2001). The Court evaluates the political question doctrine on a case-by-case basis and considers the following:

> Prominent on the surface of any case held to involve a political question is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking

> independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

263 F.3d at 1174 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

The Constitution commits the power of appointment of federal judges to the Executive Branch, upon the advice and consent of the Senate. U.S. Const. art. II, § 2. Similar to the Tenth Circuit's analysis in *Schroder*, the Court recognizes that while the appointment power of the Executive "expressly involves the participation of the Legislature, nowhere does the Constitution contemplate the participation by the third, non-political branch, that is the Judiciary," in the appointment of "judges of the Supreme Court, and all other officers of the United States."[3] U.S. Const. art. II, § 2; 263 F.3d at

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3. In *Schroder*, the Tenth Circuit evaluated the power of the judiciary to review or regulate foreign policy and commerce activities as committed by the Constitution to the Executive and Legislative Branches. 263 F.3d at 1174-76. This Court can analogize the appointment power and process contested by Plaintiff in this matter to the treaty negotiation and confirmation process discussed by the *Schroder* Court, which concluded the *Schroder* plaintiffs' action was indeed barred by the political question doctrine.

1174 (citation omitted). *See* U.S. Const. art. III. Furthermore, nothing in Article III indicates the Court should presume it has "judicially discoverable and manageable standards" to control the timeliness of actions explicitly delegated by the Constitution to the Executive and Legislative Branches. This leads naturally to the conclusion that the Court would have to make "initial policy determination[s] of a kind clearly for nonjudicial discretion," given the Constitution's clarity regarding the appointment power in this circumstance.

The Court believes that by granting Plaintiff's request, the Court would engage in the utmost expression of a "lack of the respect due coordinate branches of government." The Constitution, in its plain text, bestows no such power onto the Judiciary to regulate the timing in which the Executive or Legislature exercises their Constitutional duties, and the Court cannot find an instance where such exercise of power took place. "Article III limits courts to adjudicating cases and controversies, thereby precluding the sort of judicial oversight of the political branches in which [Plaintiff] invite[s] [the Court] to engage." *Schroder*, 263 F.3d at 1175. Plaintiff would do better to seek his requested relief through the political, not legal, process. For these reasons, the Court concludes lack of standing and the political question doctrine strip the Court of subject matter jurisdiction and require dismissal of Plaintiff's action.

IV. Conclusion

Accordingly, it is hereby RECOMMENDED that Plaintiff's Amended Complaint be *sua sponte* **dismissed with prejudice** for lack of subject matter jurisdiction.

Dated at Denver, Colorado, this 12th day of February, 2009.

BY THE COURT:

s/ Michael E. Hegarty
Michael E. Hegarty
United States Magistrate Judge

APPENDIX D — RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1) DATED AND FILED FEBRUARY 9, 2009

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 08-cv-01929-REB-MEH

JOHN MARSHALL COGSWELL,

Plaintiff,

v.

JOSEPH R. BIDEN, JR.,
President of the United States Senate,

Defendants.

RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(1)

Pending before the Court is Defendants' Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) [*filed November 14, 2008; docket #8*]. The Motion has been referred to this Court for recommendation [docket #10]. *See* 28 U.S.C. § 636(b)(1)(A); D.C. Colo. LCivR 72.1.C. The matter is fully briefed, and the Court held a hearing regarding the Motion on February 5, 2009. For the reasons set forth below, the Court recommends that

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Defendants' Motion to Dismiss Complaint Pursuant to Rule 12(b)(1) be **granted**.[1]

I. Background

Plaintiff initiated this "*Bivens* type action" on September 9, 2008. (Docket #1.) In his original Complaint, Plaintiff named Henry Paulson, U.S. Secretary of the Treasury, and Richard Cheney, as President of the U.S. Senate, as defendants. Plaintiff requested the Court to issue an injunction enjoining Henry Paulson, the U.S. Secretary of the Treasury, from paying the salaries of the U.S. Senators until the U.S.

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1. Be advised that all parties shall have ten (10) days after service hereof to serve and file any written objections in order to obtain reconsideration by the District Judge to whom this case is assigned. Fed. R. Civ. P. 72. The party filing objections must specifically identify those findings or recommendations to which the objections are being made. The District Court need not consider frivolous, conclusive or general objections. A party's failure to file such written objections to proposed findings and recommendations contained in this report may bar the party from a *de novo* determination by the District Judge of the proposed findings and recommendations. *United States v. Raddatz*, 447 U.S. 667, 676-83 (1980); 28 U.S.C. § 636(b)(1). Additionally, the failure to file written objections to the proposed findings and recommendations within ten (10) days after being served with a copy may bar the aggrieved party from appealing the factual findings of the Magistrate Judge that are accepted or adopted by the District Court. *Thomas v. Arn*, 474 U.S. 140, 155 (1985); *Moore v. United States*, 950 F.2d 656, 659 (10th Cir. 1991); *Niehaus v. Kansas Bar Ass'n*, 793 F.2d 1159, 1164 (10th Cir. 1986).

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Senate advises and consents to "the President's nominated district court judges" by appointing two more judges to the bench of the U.S. District Court for the District of Colorado.[2] (*Id.* at 1, 11.) Alternately, Plaintiff sought a declaratory judgment stating that the "unreasonable delay of the U.S. Senate in acting on the President's nominations means consent to such nominations without advice." (*Id.* at 1.) On February 5, 2009, the Court granted a motion submitted by Plaintiff to dismiss his request for an injunction and Henry Paulson as a party, and to substitute Joseph R. Biden, Jr., pursuant to Fed. R. Civ. P. 25(d), as a party in the stead of Richard Cheney. (*See* Docket #18.) Thus, this Recommendation pertains only to Plaintiff's request for a declaratory judgment against Joseph R. Biden, Jr., as President of the U.S. Senate.

Plaintiff submits that the delay of the United States District Court in awarding attorney's fees in a case in which Plaintiff was named as a defendant and subsequently dismissed without prejudice creates an injury giving rise to his right to bring this suit. He also contends the "unreasonable" time taken by the U.S. Senate in filling the open district court seats in Colorado violate his "constitutional right to meaningful access to this Court." (*Id.* at 6-7.) Plaintiff further presents to the Court that it can infer the Plaintiff, as a "member of the people's constituent power," also represents all other litigants "throughout the nation" who he alleges are affected with the same injury he asserts. (Docket #15

2. At the time Plaintiff filed his Complaint, three seats were vacant and one has since been filled.

at 5.) Plaintiff reiterated these arguments at the February 5, 2009 hearing.

In response, Defendants filed the Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) presently before the Court. (Docket #8.) Defendants construe Plaintiff's Complaint as a challenge to the Senate judicial confirmation process itself, not a true claim against the named defendants, which is therefore protected by the Speech or Debate Clause. (*Id.* at 3, 7-8.) Furthermore, Defendants contend Plaintiff lacks standing and the "political question doctrine deprive[s] this Court of subject matter jurisdiction." (*Id.* at 1.)

II. Standard for Dismissal under Fed. R. Civ. P. 12(b)(1)

Fed. R. Civ. P. 12(b)(1) empowers a court to dismiss a complaint for "lack of jurisdiction over the subject matter." Dismissal under Rule 12(b)(1) is not a judgment on the merits of a plaintiff's case, but only a determination that the court lacks authority to adjudicate the matter. *See Castaneda v. INS*, 23 F.3d 1576, 1580 (10th Cir. 1994) (recognizing federal courts are courts of limited jurisdiction and may only exercise jurisdiction when specifically authorized to do so). A court lacking jurisdiction "must dismiss the cause at any stage of the proceeding in which it becomes apparent that jurisdiction is lacking." *Basso v. Utah Power & Light Co.*, 495 F.2d 906, 909 (10th Cir. 1974). A Rule 12(b)(1) motion to dismiss "must be determined from the allegations of fact in the complaint, without regard to

mere conclusory allegations of jurisdiction." *Groundhog v. Keeler*, 442 F.2d 674, 677 (10th Cir. 1971).

In a lawsuit against the United States or an agency of the United States, the United States must waive its sovereign immunity and consent to suit in order for a court to exercise subject matter jurisdiction over the case. *See, e.g., U.S. v. Mitchell*, 463 U.S. 206, 212 (1983); *Lonsdale v. U.S.*, 919 F.2d 1440, 1442-44 (10th Cir. 1990). The burden of establishing subject matter jurisdiction is on the party asserting jurisdiction. *See Basso*, 495 F.2d at 909.

A federal court must construe a *pro se* plaintiff's "pleadings liberally, applying a less stringent standard than is applicable to pleadings filed by lawyers. [The] court, however, will not supply additional factual allegations to round out a plaintiff's complaint or construct a legal theory on plaintiff's behalf." *Whitney v. New Mexico*, 113 F.3d 1170, 1173-74 (10th Cir. 1997) (quotations and citations omitted). Although Plaintiff represents himself in this case, Plaintiff is a lawyer admitted in good standing in the U.S. District Court for the District of Colorado, therefore the Court holds Plaintiff to the standards expected from members of the Bar.

III. Analysis

The Court recommends Defendants' Motion to Dismiss pursuant to Fed. R. Civ. P. 12(b)(1) be granted for three reasons.[3] First, Plaintiff's assertion of *Bivens* as the jurisdictional basis for his claim is improper; second, Plaintiff lacks standing; and third, the political question doctrine bars Plaintiff's action. The Court addresses each grounds for dismissal in turn.

A. Bivens

The Court construes Plaintiff's suit against Joseph R. Biden, Jr., to be in his official capacity as the President of the U.S. Senate. Official capacity suits against a federal officer are in actuality suits against

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3. The Court emphasizes that Defendants' Motion to Dismiss is pursuant to Fed. R. Civ. P. 12(b)(1), which is evaluated by a standard different from that of Fed. R. Civ. P. 12(b)(6), contrary to what Plaintiff asserts in his Response. Plaintiff argues the Court should only grant the Motion to Dismiss "if, viewing the well-pleaded factual allegations in the complaint as true and in the light most favorable to the non-moving party, the complaint does not contain 'enough facts to state a claim to relief that is plausible on its face." (Docket #15 at 1 (citations omitted).) The cases Plaintiff cites to support this contention consider the standard for a motion to dismiss under 12(b)(6), not 12(b)(1). 12(b)(1) requires the Court determine its authority to adjudicate the case, not the value of the merits of the claim. The Court's authority in this matter is precluded by subject matter jurisdiction and the justiciability doctrines of standing and political question, therefore the Court recommends dismissal for lack of jurisdiction.

the United States. *See, e.g., Kentucky v. Graham*, 473 U.S. 159, 165 (1985) ("Official-capacity suits . . . generally represent only another way of pleading an action against an entity of which an officer is an agent"); *Atkinson v. O'Neill*, 867 F.2d 589, 590 (10th Cir. 1989) ("when an action is one against named individual defendants, but the acts complained of consist of actions taken by defendants in their official capacity as agents of the United States, the action is in fact one against the United States." (citations omitted)). "It is well settled that the United States and its employees, sued in their official capacities, are immune from suit, unless sovereign immunity has been waived." *Atkinson*, 867 F.2d at 590 (citations omitted).

In his Complaint, Plaintiff relies on *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics* in conjunction with 28 U.S.C. § 1331, commonly referred to as a *Bivens* action, to establish subject matter jurisdiction over his claims. 403 U.S. 388 (1971). In *Bivens*, the Supreme Court allowed suit for money damages against federal officers in their individual capacities who committed constitutional violations under color of federal law. Plaintiff himself identifies *Bivens* as authorizing a damages remedy; however, Plaintiff requests solely injunctive relief. (Docket #1 at 1, n.1.) Moreover, the Tenth Circuit established,

> There is no such animal as a *Bivens* suit against a public official tortfeasor in his or her official capacity. Instead, any action that charges such an official with wrongdoing while

> operating in his or her official capacity as a United States agent operates as a claim against the United States.

Simmat v. U.S. Bureau of Prisons, 413 F.3d 1225, 1231 (10th Cir. 2005) (quoting *Farmer v. Perrill*, 275 F.3d 958, 963 (10th Cir. 2001)). Plaintiff's pleading pursuant to *Bivens* bars his claim for injunctive relief against a federal agent in his official capacity, which is in fact, a claim for injunctive relief against the United States. Therefore, the Court recommends dismissal based on Plaintiff's deficient assertion of proper subject matter jurisdiction.

B. Standing

Even if Plaintiff properly pled jurisdiction, the prerequisite of standing to bring a claim precludes Plaintiff's action. Dismissal of a case for lack of standing is proper pursuant to Fed. R. Civ. P. 12(b)(1). *See Colo. Envtl. Coal. v. Wenker*, 353 F.3d 1221, 1227 (10th Cir. 2004) (treating appeal as reviewing dismissal pursuant to Rule 12(b)(1) because the district court determined plaintiffs lacked standing). At the hearing, Plaintiff requested the Court to apply a "liberal" construction of standing to this action, pursuant to *Broadrick v. Oklahoma*. 413 U.S. 601, 612 (1973) (recognizing the Court's alteration "of traditional rules of standing to permit—in the First Amendment area—'attacks on overly broad statutes with no requirement that the person making the attack demonstrate that his own conduct could not be regulated by a statute drawn with

the requisite narrow specificity.'" (citation omitted)). However, the Supreme Court stated this doctrine regarding "facial overbreadth" of a statute "has been employed by the Court sparingly and only as a last resort." *Id.* at 613. The *Broadrick* Court opined that principles of standing "reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the validity of the Nation's laws." *Id.* at 611. Accordingly, the Court refrains from extending the limited First Amendment exception in this matter. Thus, the *Lujan* Court's traditional standing analysis applies and requires that, in order to satisfy the jurisdictional requirement of constitutional standing, Plaintiff "must allege (and ultimately prove) that [he has] suffered an 'injury in fact,' that the injury is fairly traceable to the challenged action of the Defendants, and that it is redressable by a favorable decision." *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1087 (10th Cir. 2006) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). (Docket #8 at 3; docket #15 at 2.) The Court concludes Plaintiff meets none of the three elements of standing, as set forth below.

Plaintiff asserts his individual injury giving rise to proper standing in this matter stems from a Motion for Attorney's Fees he filed on June 1, 2005, in a case in which he was named as a defendant and subsequently dismissed without prejudice as a party. Defs.' Mot. for Att'y's Fees, *Ptasynski v. CO2 Claims Coal., LLC*, No. 02-cv-00830-WDM-MEH (D. Colo. June 1, 2005). The District Court granted in part and denied in part the

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Motion for Attorney's Fees in a March 21, 2006, order. Order, *Ptasynski*, No. 02-cv-00830-WDM-MEH (D. Colo. Mar. 1, 2006). The Motion was granted in part "as to the entitlement of fees but denied in part as to the amount" of the fee award without "further submission," because the Motion had been submitted without "an affidavit of an independent attorney . . . concerning the reasonableness of the hourly rates and hours claimed by the movant." (*Id.* at 7.)

Plaintiff (as a defendant in *Ptasynski)* submitted a response to the District Court's order on April 14, 2006, purposed to satisfy the affidavit requirement. The *Ptasynski* plaintiff then submitted a response to the Motion for Attorney's Fees, which was replied to by Plaintiff and the other relevant *Ptasynski* defendants on May 10, 2006. The case then proceeded as to the other defendants not dismissed without prejudice through jury trial which completed on April 20, 2007. *See Ptasynski v. CO2 Claims Coal.*, No. 02-cv-00830-WDM-MEH, 2007 WL 1306492 (D.C. Colo. May 3, 2007). After the docket entry on May 10, 2006, no other activity on the *Ptasynski* docket relates to Plaintiff. The Court will not speculate why the amount of fees was not conclusively determined and awarded; however, the Court notes that neither Plaintiff, nor any of the other three defendants included in the original motion for fees, has ever filed a Motion for Order, or for Clarification, or for a Status Conference, in regards to the fees he alone asserts give rise to an injury conveying standing in this matter.

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In *Lujan*, the Supreme Court established an "injury in fact" must be "concrete and particularized . . . actual or imminent, not 'conjectural' or 'hypothetical.'" 504 U.S. at 560 (citations omitted). Due to the fact that Plaintiff has taken no discernable steps to claim the fees in question (other than the filing of this lawsuit), and none of the other entitled *Ptasynski* defendants have either, the Court views this alleged injury as "conjectural" or "hypothetical." Plaintiff is still free to move the Court for consideration of the fee calculation, therefore the Court concludes Plaintiff's alleged injury is not an injury-in-fact at all, but is merely a loose end from litigation that needs to be tied up, upon initiative by those to which it pertains.

Plaintiff's asserted injury also falls short of the remaining two elements required to satisfy standing. His injury must be "fairly traceable to the challenged action of the Defendants" and "redressable by a favorable decision." *Lujan*, 504 U.S. at 560-61. "When the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but is ordinarily 'substantially more difficult' to establish." *Id.* at 562. A speculative connection between an indirect injury claimed and the challenged action does not fulfill causation for the purposes of standing. *Allen v. Wright*, 468 U.S. 737, 757-58 (1984).

Plaintiff challenges Defendant Biden in his role as President of the U.S. Senate, but fails to allege with any particularity how this federal agent caused Plaintiff to not recover the attorney's fees he claimed and was,

in essence, granted, in 2006. In fact, Plaintiff describes no facts demonstrating with any concrete probability that the allegedly "delayed" judicial confirmation process had any effect on the calculation and award of attorney's fees in the *Ptasynski* matter. Plaintiff seeks the Court to infer some causal connection by recognizing an "associated ripple effect;" however, concurrent with the *Allen* Court's conclusion, it is entirely speculative whether two (or three) more judges appointed to the bench in Colorado would generate an award of attorney's fees to Plaintiff in the *Ptasynski* matter any more or less timely than the status quo. The great causal leap Plaintiff requests is simply too far outside of the legal bounds defining standing.[4]

Moreover, Plaintiff's contention that "the Court can also infer that Plaintiff does not stand alone and that his injury affects many other courts throughout the nation and the litigants therein," thereby inspiring Plaintiff to act "as a member of the people's constituent power," violates the bar against asserting a "generalized

4. Additionally, in response to Plaintiff's claim that "defendants have caused him injury by denying him meaningful access to the judicial power of the United States and that this injury is great, immediate and irreparable," the Court points him to the rather expeditious resolution of the action he presently brings, which was filed on September 9, 2008, and recommended for dismissal not even six months later upon the Motion to Dismiss filed on November 14, 2008. (Docket #15 at 2.) Such evidence directly contradicts Plaintiff's assertion of "great, immediate and irreparable" injury stemming from his allegations of "the U.S. Senate [refusing] to perform its duty." (*Id.*)

grievance," which is a well-settled rule in evaluating prudential standing. *See, e.g., Bd. of County Comm'rs of Sweetwater County v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) (reiterating that a plaintiff must also meet the requirements of prudential standing in addition to constitutional standing) (citing *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("when the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction.")). (Docket #15 at 5.) As mentioned by the Supreme Court in *Allen*, barring the "adjudication of generalized grievances" arises from the determination that such claims are "more appropriately addressed in the representative branches." 468 U.S. at 751.

Similarly, Plaintiff cannot meet the third constitutional standing requirement, that his asserted injury could be redressed by a favorable decision in this matter, because "'a federal court is not the proper forum to press' general complaints about the way in which government goes about its business." *Allen*, 468 U.S. at 760 (citation omitted). Even if the Court were to do as Plaintiff suggests and issue a declaratory judgment that the U.S. Senate has somehow voided its Constitutional right and obligation to advise and consent to the appointment of federal judges, nothing in Plaintiff's pleadings demonstrates a causal link between such order and Plaintiff recovering attorney's fees from the *Ptasynski* matter. The Constitution clearly allocates the power to appoint "judges of the supreme court, and all other officers of the United States" to the Executive

Branch upon the advice and consent of the Senate, and the judiciary lacks the power to restructure the "apparatus established by the Executive Branch [and Legislative Branch] to fulfill [their] legal duties" as articulated by the Constitution. U.S. Const. art. II, § 2; *see Allen*, 468 U.S. at 761.

"When a plaintiff seeks to enjoin the activity of a government agency, even within a unitary court system, his case must contend with the well-established rule that the Government has traditionally been granted the widest latitude in the 'dispatch of its own internal affairs.'" 468 U.S. at 761. Based on this and the other binding legal precedent set forth herein, the Court is simply unable, by virtue of the separation of powers doctrine underlying constitutional standing, to recognize Plaintiff's satisfaction of such jurisdictional requirement in this matter.

C. Political Question

In addition to the bars of improperly pled jurisdiction and standing, the political question doctrine precludes Plaintiff's action. "Prudence, as well as separation-of-powers concerns, counsels courts to decline to hear 'political questions.'" *Schroder v. Bush*, 263 F.3d 1169, 1173-74 (10th Cir. 2001). The Court evaluates the political question doctrine on a case-by-case basis and considers the following:

> Prominent on the surface of any case held to involve a political question is found [1] a textually

> demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.

263 F.3d at 1174 (quoting *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

The Constitution commits the power of appointment of federal judges to the Executive Branch, upon the advice and consent of the Senate. U.S. Const. art. II, § 2. Similar to the Tenth Circuit's analysis in *Schroder*, the Court recognizes that while the appointment power of the Executive "expressly involves the participation of the Legislature, nowhere does the Constitution contemplate the participation by the third, non-political branch, that is the Judiciary," in the appointment of "judges of the Supreme Court, and all other officers of the United States." U.S. Const. art. II, § 2; 263 F.3d at

1174 (citation omitted).[5] *See* U.S. Const. art. III. Furthermore, nothing in Article III indicates the Court should presume it has "judicially discoverable and manageable standards" to control the timeliness of actions explicitly delegated by the Constitution to the Executive and Legislative Branches. This leads naturally to the conclusion that the Court would have to make "initial policy determination[s] of a kind clearly for nonjudicial discretion," given the Constitution's clarity regarding the appointment power in this circumstance.

Moreover, the Court believes that by granting Plaintiff's request, the Court would engage in the utmost expression of a "lack of the respect due coordinate branches of government." Plaintiff characterizes his requests for relief as a "desire[ ] to assign legal consequences to the delay and, in this respect, seeks to establish a rule that constitutional inaction is subject to the general rule that, when time is not mentioned, a reasonable time is implied." (Docket #15 at 8.) The Constitution, in its plain text, bestows no such power onto the Judiciary to regulate the timing in

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5. In *Schroder*, the Tenth Circuit evaluated the power of the judiciary to review or regulate foreign policy and commerce activities as committed by the Constitution to the Executive and Legislative Branches. 263 F.3d at 1174-76. This Court can analogize the appointment power and process contested by Plaintiff in this matter to the treaty negotiation and confirmation process discussed by the *Schroder* Court, which concluded the *Schroder* plaintiffs' action was indeed barred by the political question doctrine.

which the Executive or Legislature exercises their Constitutional duties, and the Court cannot find an instance where such exercise of power took place. "Article III limits courts to adjudicating cases and controversies, thereby precluding the sort of judicial oversight of the political branches in which [Plaintiff] invite[s] [the Court] to engage." *Schroder*, 263 F.3d at 1175. Plaintiff would do better to seek his requested relief, which is in essence a fully-appointed federal bench in the District of Colorado, through the political, not legal, process. For these reasons, the Court concludes improperly pled subject matter jurisdiction, lack of standing, and the political question doctrine require dismissal of Plaintiff's action.

IV. Conclusion

Accordingly, it is hereby RECOMMENDED that Defendants' Motion to Dismiss Complaint Pursuant to Fed. R. Civ. P. 12(b)(1) [*filed November 14, 2008; docket #8*] be **GRANTED**.

Dated at Denver, Colorado, this 9th day of February, 2009.

BY THE COURT:

s/ Michael E. Hegarty
Michael E. Hegarty
United States Magistrate Judge